U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: VERMONT SERVICE CENTER Date: SEP 21 2007

EAC 06 044 51882

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. In addition, the alien employment certification supporting the petition will be invalidated.

The petitioner is a gourmet food manufacturer and wholesaler. According to Part 6 of the petition, the petitioner seeks to employ the beneficiary permanently in the United States as a business management consultant pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence. For the reasons discussed below, we find that the petitioner has not overcome the director's basis of denial. Moreover, we find that the beneficiary's 75 percent ownership of the petitioner (his wife owned the remaining 25 percent) at the time the petitioner filed the Form ETA 750 Application for Alien Employment Certification justifies our invalidation of the Form ETA 750 pursuant to 20 C.F.R. § 656.30(d) as in effect when the ETA 750 was filed.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on January 7, 2002. The proffered wage as stated on the Form ETA 750 is $102,981 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of March 1998.

On the petition, the petitioner claimed to have an establishment date in 1998, a gross annual income of $505,866, no net income and 18 employees. In support of the petition, the petitioner submitted its Internal Revenue Service (IRS) Form 1065 U.S. Return of Partnership Income for the years 2001 through 2004. The tax return for 2001 does not relate to the petitioner's ability to pay the proffered wage as of the priority date in January 2002 and will not be considered.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on June 7, 2006, the director requested additional evidence pertinent to that ability, including evidence of wages paid to the beneficiary.

In response, the petitioner submitted copies of the petitioner's bank account statements for January 2002 and December 2002 and evidence of the petitioner's $500,000 line of credit.

The director determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date, and, on October 19, 2006, denied the petition.

On appeal, counsel asserts that much of the petitioner's current liabilities are actually "equity" or at least long term liabilities. The petitioner submits a breakdown of the petitioner's current liabilities and a letter from [redacted], the petitioner's general counsel, asserting that the current liabilities are owed to the beneficiary as repayment of a loan and will only be repaid should the petitioner show a profit. In his own letter, the beneficiary confirms that he loaned the money to the petitioner and only expects repayment "once the company makes profit." Both counsel and [redacted]assert that the funds from the petitioner's line of credit, should they be withdrawn, would be a long-term liability. The petitioner also submitted its bank statements covering 2003 through 2005 in addition to resubmitting the statements for January and December 2002.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it paid the beneficiary any wages as of the priority date. Rather, as the general partner of the petitioning company, the beneficiary received minimal interest income of $439 in 2002, $1,136 in 2003 and $392 in 2004 according to his Schedules K-1. These schedules show no guaranteed payments to the beneficiary and as the petitioner suffered net losses in all three years, the beneficiary received no share of the net income.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Federal courts have recognized the reliance on federal income tax returns as a valid basis for determining a petitioner's ability to pay the proffered wage. *See Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986). *See also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532, 536 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080, 1083 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647, 650 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly,

showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should be considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.[1] A limited liability company's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 15(d) through 17(d). If the petitioner's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

The tax returns reflect the following information for the following years:

	2002	2003	2004
Net income (loss)	($71,050)	($99,263)	($1,708)
Current Assets	$354,646	$225,848	$208,877
Current Liabilities	$470,641	$580,010	$745,896
Net current assets	($115,995)	($354,162)	($537,019)

On appeal, counsel asserts that much of the petitioner's current liabilities, expressed as "wages payable" or "interest payable" on the statements attached to the tax returns are actually equity or at least long term liabilities. Counsel, [redacted] and the beneficiary all assert that this money represents funds loaned to the petitioner by the beneficiary, which he does not expect to be repaid

[1] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

until the petitioner shows a profit. In effect, the assertion is that we should consider funds originating from the beneficiary towards an ability to pay his own wages. While loans from members may be a normal business practice for limited liability companies, we will not entertain the assertion that the petitioner can pay the beneficiary the proffered wage from money it has borrowed from the beneficiary.

The petitioner has not demonstrated that it paid any *wages* to the beneficiary during 2002, 2003 or 2004 and the Schedules K-1 show no profit shares and minimal interest. In all three years, the petitioner shows a net loss and negative net current assets. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage due to wages actually paid or out of its net income or net current assets.

The petitioner has also not demonstrated that any other funds were available to pay the proffered wage sufficient to cover all three years. Counsel's reliance on the balances in the petitioner's bank account is misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Further, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L considered above in determining the petitioner's net current assets. Finally, the balances in the petitioner's accounts range from a high of $275,855 in January 2003 to a low of $7,614 in September 2005. The petitioner's balances never went above $82,364 in 2005 and, in fact, the petitioner finished 2005 with a balance of only $43,974. These amounts do not establish the petitioner's ability to pay three yearly salaries of $102,981 from January 2002 through December 2005.

Finally, the petitioner's credit line is not persuasive. As stated by the director, a "bank line" or "line of credit" is a bank's unenforceable commitment to make loans to a particular borrower up to a specified maximum during a specified time period. A line of credit is not a contractual or legal obligation on the part of the bank. *See Barron's Dictionary of Finance and Investment Terms*, 45 (1998). The director further concluded that the petitioner had not established that the credit line would augment and not weaken the petitioner's overall financial position.

On appeal, [redacted] states that the $500,000 credit line is a long-term liability. The petitioner did not submit evidence from the creditor affirming that money borrowed against the credit line would not be payable in one year or less. Regardless, CIS will give less weight to loans and debt as a means of paying salary since the debts will increase the firm's liabilities and will not improve its overall financial position. Although lines of credit and debt are an integral part of any business operation, CIS must evaluate the overall financial position of a petitioner to determine whether the employer is making a realistic job offer and has the overall financial ability to satisfy the proffered wage. *See Matter of Great Wall*, 16 I&N Dec. 142 (Acting Regl. Commr. 1977). In this case, the petitioner has not demonstrated that it has ever shown a profit.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage as of January 2002. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Beyond the decision of the director, the record reflects that the original job offer was not realistic and that the ETA 750 must be invalidated pursuant to 20 C.F.R. § 656.30(d). An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis). We note that in *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. 401, 405 (Commr. 1986), the Commissioner invalidated an alien employment certification at the appellate stage. Thus, the precedent exists for such action.

The petitioner has the burden to show that a valid employment relationship exists and that a bona fide job opportunity is available to U.S. workers. *Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). A relationship invalidating a bona fide job offer may arise where the beneficiary is related to the petitioner by "blood" or it may "be financial, by marriage, or through friendship." *See Matter of Sunmart 374*, 00-INA-93 (BALCA 2000). Where the petitioner is owned by the person applying for the position, it is not a bona fide offer. *See Bulk Farms, Inc. v. Martin*, 963 F.2d 1286, 1287 (9th Cir. 1992) (denied labor certification application for president, sole shareholder and chief cheese maker even where no person qualified for position applied).

In *Hall v. McLaughlin*, 864 F.2d 868, 875 (D.C. Cir. 1989), the court affirmed the district court's dismissal of the alien's appeal from the Secretary of Labor's denial of his labor certification application. The court found that where the alien was the founder and corporate president of the petitioning corporation, absent a genuine employment relationship, the alien's ownership in the corporation was the functional equivalent of self-employment.

On the ETA 750, the petitioner indicated that the proffered position was as a Business Management Consultant and that the beneficiary would report to the petitioner's Vice President. As noted by the director in his March 20, 2006 notice of intent to deny the petition, the Schedules K-1 relating to the petitioner contained in the record reveal that the beneficiary was previously the sole managing member and owned 75 percent of the petitioner. Prior to filing the instant petition, the beneficiary transferred his interest in the petitioner to a trust of which he is a settler. The beneficiary's wife remained a member of the petitioner with a 25 percent interest. The director did not raise this issue in the final denial. On appeal, the petitioner submitted a 2003/2004 membership application for the Netherlands American Business Group of New England for the petitioner listing the beneficiary as its president.

According to *Matter of Silver Dragon Chinese Restaurant,* 19 I&N Dec. at 405, the title of the alien's supervisor in cases where the beneficiary has an interest in the petitioning company is a material fact for consideration by the Department of Labor. Specifically, the beneficiary's ownership in the company may suggest that the job offer was never bona fide. By stating that the

beneficiary, the sole managing member of the petitioner at the time the ETA 750 was filed, would report to the Vice President, the petitioner willfully misrepresented the title of the beneficiary's supervisor. The regulation at 20 C.F.R. § 656.30(d)(2002) provides:

> After issuance labor certifications are subject to invalidation by the INS or by a Consul of the Department of State upon a determination, made in accordance with those agencies, procedures or by a Court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of such fraud or willful misrepresentation becomes known to a RA [Regional Administrator, Employment and Training Administration] or to the Director, the RA or Director, as appropriate, shall notify in writing the INS or State Department, as appropriate. A copy of the notification shall be sent to the regional or national office, as appropriate, of the Department of Labor's Office of Inspector General.

In light of the petitioner's misrepresentation on the ETA 750, we declare the alien employment certificate approved for the petitioner on June 20, 2002 in favor of the beneficiary as a business management consultant to be invalid. As there is no valid alien employment certification underlying the present petition, it is also deniable on that ground in addition to the petitioner's lack of ability to pay the proffered wage.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.